No. 90-970

In the Supreme Court of the United States

OCTOBER TERM, 1990

LECHMERE, INC.,
PETITIONER,

v.

NATIONAL LABOR RELATIONS BOARD,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR PETITIONER

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QUESTION FOR REVIEW

Has the National Labor Relations Board impermissibly expanded the right of union representatives to trespass on private property beyond the limits established by the Supreme Court in *NLRB* v. *Babcock & Wilcox Co.*, 351 U.S. 105 (1956).

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BRIEF FOR THE PETITIONER

Petitioner, Lechmere, Inc. ("Lechmere"),[1] respectfully petitions this Court to reverse a judgment and decree of the United States Court of Appeals for the First Circuit ("First Circuit") and deny enforcement to an order of the National Labor Relations Board ("NLRB" or the "Board").

[1] In compliance with Rule 29.1 of the Rules of the Supreme Court of the United States, Lechmere states the following: Lechmere, Inc. is a Massachusetts corporation wholly owned by LMR Acquisition Corp.

OPINIONS BELOW

The First Circuit's opinion is reported at 914 F.2d 313 (1st Cir. 1990), and appears at Appendix A to Lechmere's Petition for Writ of Certiorari (hereafter "Pet." or "the Petition"). The underlying decision and order of the NLRB are reported at 295 N.L.R.B. No. 15, 131 L.R.R.M. (BNA) 1480 (1989), and appear at Appendix B to the Petition. Included in the Board's decision is the earlier opinion and order of the Administrative Law Judge in Case No. 39-CA-3571. (Pet. B-9—B-29) Finally, Lechmere filed with the First Circuit a Suggestion for Rehearing En Banc which was denied by an order of the court appearing at Appendix C to the Petition.

JURISDICTION

Lechmere invokes the jurisdiction of this Court under Section 10(e) of the National Labor Relations Act, as amended (the "Act"). 29 U.S.C. §160(e); *see* 28 U.S.C. §1254(1). The First Circuit enforced the NLRB's order on September 17, 1990. Lechmere's December 17, 1990 Petition for Writ of Certiorari was timely. Sup. Ct. R. 13.1.

STATUTORY PROVISIONS INVOLVED

Section 7 of the Act provides in part: "Employees shall have the right to self organization, to form, join, or assist labor organizations . . . . " 29 U.S.C. §157. Section 8(a)(1) of the Act provides: "It shall be an unfair labor practice for an employer . . . to interfere with, restrain, or coerce employees in the exercise of rights guaranteed in Section 7." 29 U.S.C. §158(a)(1).

STATEMENT OF THE CASE

This case presents the frequently recurring question of whether labor union organizers can trespass on private property to engage in activity otherwise protected by Section 7 of the Act. In the typical situation, union agents are ejected from private property, and the union files an unfair labor practice charge alleging that the employer has interfered with the employees' Section 7 right to organize and form unions. The Board either finds merit to the charge and orders that some form of access be allowed, or dismisses the charge and lets ordinary property rights prevail.

For at least thirty years the Board has devised various approaches to resolve the contest between "Section 7 rights"[2] and property rights,[3] all purporting to be based upon the only Supreme Court decision that has ever squarely addressed the issue, *NLRB* v. *Babcock & Wilcox Co.*, 351 U.S. 105 (1956). At issue is the Board's most recent approach.

Lechmere is a retail store chain engaged in the sale of goods other than clothing. (Joint Appendix, hereafter "J.A." 17, 114; *and see* transcript of proceedings before the Administrative Law Judge, hereafter "R." 4-5). In the summer of 1987, representatives from Local 919, United Food and Commercial

[2] The Union does not have a direct Section 7 right to communicate with employees. Rather, at issue is the employees' right to self-organization. Thus, "any right [that union organizers] may have to solicit on an employer's property is a derivative of the right of that employer's employees to exercise their organization rights effectively." *Sears, Roebuck & Co.* v. *San Diego County Council of Carpenters*, 436 U.S. 180, 206 n.42 (1978).

[3] The Court has noted that an employer's property rights, created by state law but explicitly protected in this context by the Fifth Amendment to the Constitution, must yield "only when *necessary* to effectuate the central purposes of the Act." *Eastex, Inc.* v. *NLRB*, 437 U.S. 556, 581 (1978) (Rehnquist, J., dissenting) (quoting *NLRB* v. *Fansteel Metallurgical Corp.*, 306 U.S. 240, 257, 265 (1939)); *see also Nollan* v. *California Coastal Comm'n*, 483 U.S. 825, 831 (1987) (characterizing the right to exclude others as "one of the most essential sticks in the bundle of rights that are commonly characterized as property") (quoting *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 433 (1982)).

Workers Union, AFL-CIO (the "Union") trespassed on private property both inside and outside Lechmere's store in Newington, Connecticut, and attempted to organize the employees. J.A. 18, 30, 35-36. Lechmere ejected the Union organizers from the store and parking lot, and thereafter consistently excluded them from private property in and around the store. J.A. 18-20. Lechmere's actions were consistent with a strict, impartially enforced no-solicitation policy. J.A. 59-66. Various groups other than the Union, including the American Automobile Association, the Salvation Army, and the Girl Scouts, had previously been excluded from soliciting on the private property at Lechmere's premises. *Id.*

The Union filed an unfair labor practice charge alleging that by enforcing its property rights, Lechmere violated Section 8(a)(1) of the Act, which prohibits interference with employees' right to self-organization. J.A. 126-27; R.3-4. After an evidentiary hearing an Administrative Law Judge ("ALJ") found merit to this charge. He evaluated the issues under *Fairmont Hotel Co.*, 282 N.L.R.B. 139, 123 L.R.R.M. (BNA) 1257 (1986), which was at that time the Board's latest interpretation of *Babcock & Wilcox*. Pet. B-21—B-24.

Lechmere filed exceptions and the full Board considered the case. The Board affirmed the ALJ but evaluated the case under yet another new approach to *Babcock & Wilcox* issues — *Jean Country*, 291 N.L.R.B. No. 4, 129 L.R.R.M. (BNA) 1201 (1988) — which had substantially modified and partially overruled the not yet two year old *Fairmont Hotel*. Pet. B-1—B-8.

Lechmere petitioned the First Circuit for review of the Board's order, and the Board filed a cross-application for enforcement, all as permitted under Sections 10(e) and (f) of the Act. 29 U.S.C. §§160(e) and (f). The First Circuit enforced the Board's order. *Lechmere, Inc.* v. *NLRB*, 914 F.2d 313 (1st Cir. 1990), Pet. A-1—A-23. Judge Torruella strongly dissented. *Id.* at 326, Pet. A-24—A-33.

Fairmont Hotel and now *Jean Country* involve a balance of

rights pitting the "strength" of private property rights against the "strength" of Section 7 rights. The outcome of this contest turns on the availability of a union's reasonable alternative means to reach employees (that is, to exercise Section 7 rights) without trespassing on a target employer's private property. To assess the appropriate accommodation, the facts must be examined in some detail.

1. *The Premises.*

Lechmere opened its Newington store in November of 1986. J.A. 114; R.4-5. "Lechmere Plaza" is a parcel 880 feet wide (north-south), and 740 feet deep (east-west). J.A. 17, 114; R.4-5. Lechmere Plaza is bounded on the east by the Berlin Turnpike, a fifty mile per hour four-lane divided highway running north-south; and on the north by Pascone Street. J.A. 114, 116. At this location, the Berlin Turnpike could be best described as a commercial, highway strip. Lechmere's neighbors to the south include a Grossman's home improvement store and a Mobil service station. Across the highway on the north side is a Bradlees' department store and a large commuter parking lot. J.A. 73. There are no sidewalks. J.A. 17.

The main driveway into Lechmere Plaza is from the southbound lanes of the Berlin Turnpike, where a turning lane allows vehicles to enter without impeding the flow of traffic. J.A. 115; R.4-5. There is another driveway off Pascone Street. *Id.* Finally, there is a separate delivery driveway off the Berlin Turnpike leading to the rear of the Lechmere store. J.A. 57, 115; R.4-5.

A grassy apron approximately forty-six feet wide runs the length of Lechmere Plaza along the Berlin Turnpike, with breaks for the two driveways. J.A. 115; R.4-5. Only a four foot strip farthest from the road is private property; the rest of the forty-six foot width is public. *Id.*

There are two structures located within Lechmere Plaza, a

free-standing Lechmere store on the south side, and over 100 feet away a strip of thirteen satellite storefronts on the west side. J.A. 114, 121; R.4-5. The remainder of the parcel is a large parking lot. *Id.* Lechmere owns a roughly triangular piece of the parcel including its store location and some of the parking area. J.A. 66-67. Newington Commercial Associates Limited Partnership owns a corresponding, roughly triangular portion containing the satellite stores. J.A. 114-15; R.4-5. There is joint ownership in some of the parking areas. *Id.* Konover Management Corporation, a general partner in Newington Commercial Associates, manages the satellite stores. *Id.*

There are no benches, chairs or other such inducements for customers to linger in front of the Lechmere store. J.A. 71. Lechmere Plaza contains no restaurants, bars, ice cream shops, convenience stores, or any other establishments that might draw a more generalized or "impulse" clientele. J.A. 15-16, 71-72. The satellite stores are specialized, including a card shop and a Radio Shack. J.A. 72. In the summer of 1987, only four of the satellite stores were open for business, including the card shop, but excluding Radio Shack. J.A. 72. As mentioned, there is no sidewalk on the Berlin Turnpike, and a fence separates Lechmere Plaza from its nearest neighbor to the south, a home improvement store. J.A. 17.

Two public telephones are located in front of the satellite stores. J.A. 114; R.4-5. However, they are at least 500 feet away from the Berlin Turnpike, across the entire Lechmere Plaza parking area. J.A. 72-73, 121; R.4-5. These telephones are not visible from the Berlin Turnpike until drivers are directly in front of Lechmere Plaza, because the traffic is travelling uphill. *Id.* There was no evidence in the record that any members of the general public or any passers-by ever made use of the pay phones in front of the satellite stores. *See* J.A. 49-51, 71-73. Pay phones are more accessible at several nearby locations. J.A. 73. For the convenience of its own customers Lechmere has pay telephones within its store. J.A. 97.

The above-listed circumstances existing in Lechmere Plaza, particularly in the summer of 1987, induced minimal interchange of customers between Lechmere and the satellite stores. J.A. 71. Further, these circumstances establish an inducement to the public to enter Lechmere Plaza for the specific purpose of shopping at one of the stores, and little else. *See* J.A. 73.

2. *Enforcement Of The No Access Policy.*

In 1982, Lechmere promulgated a no solicitation/no distribution policy for all its stores that has not meaningfully changed since. J.A. 87-91, 116; R.4-5. In pertinent part, that policy states:

> Non-associates [non-employees] are prohibited from soliciting and distributing literature at all times anywhere on Company property, including parking lots. Non-associates have no right of access to the non-working areas and only to the public and selling areas of the store in connection with its public use.

J.A. 123-25; R.4-5.

The policy is a serious matter to Lechmere. All Lechmere employees are informed during orientation about the no solicitation/no distribution policy. J.A. 68. The policy is contained in an introductory booklet distributed to all new employees, and each employee signs an acknowledgement form indicating receipt of the booklet, and accepting the obligation to learn its contents. J.A. 68-70. Doorways to the Newington store are posted with this sign: "TO THE PUBLIC: No Soliciting, Canvassing, Distribution of Literature or Trespassing by Non-Employees in or on Premises." J.A. 115-16; R.4-5.

The policy has been consistently and unfailingly enforced at

the Newington store since it opened in November of 1986. Especially when the store was new, the General Manager rejected numerous telephone requests for permission to solicit on the premises (raffles, bake sales, etc.). J.A. 65-66. More specifically, in the fall of 1986 the General Manager immediately protested to the American Automobile Association after they entered the parking lot without permission and left leaflets on cars; he also caused those leaflets to be removed from windshields. Later, the General Manager denied the Salvation Army's request to station a "bell ringer" at the store for the 1986 Holiday season. In early March of 1987, he protested to a local Burger King restaurant about leaflets left on cars during the previous weekend. Finally, in the spring of 1987 he personally asked Girl Scouts to abandon their attempt to sell cookies in front of the store. J.A. 59-64.

This consistent enforcement was later applied to the Union's solicitations, as described *infra*.

3. *The Lechmere Employees At Newington.*

In the summer of 1987 there were 201 employees at the Newington store, of which 179 lived in Newington or two contiguous cities, Hartford and New Britain. J.A. 76-77.

The store was open to customers that summer from 10:00 a.m. to 9:30 p.m., Monday through Saturday. J.A. 73. Employees generally arrived for work about one-half hour early, at 9:30 a.m., and they departed within one-half hour after closing, by 10:30 p.m. J.A. 22-23, 73-74. The parking lot lights automatically shut off at 10:30 p.m. each night. J.A. 74.

Employees are asked to park their cars on the eastern side of the parking lot, close to both the Berlin Turnpike and the main driveway into Lechmere Plaza. J.A. 15, 121; R.4-5. Before work hours employees enter the store through the "customer pick-up" entrance, on the east side of the building, rather than through the main entrance on the north side. J.A. 57-59,

121; R.4-5. There are no signs or barriers denoting an employee parking area or an employee entrance to the store. J.A. 16, 58. Customers will park in the same area, especially those picking up large purchases at the east entrance to the store, which is designated for that purpose. J.A. 57-59.

4. *The Union Activity At Newington.*

In the summer of 1987, the Union made a variety of attempts to organize the Lechmere employees at Newington. The very first effort was a full page advertisement in the June 16 Hartford Courant, marked by a large headline ("Attention Lechmere Employees"), and containing a clip-out union authorization card. J.A. 116, 119; R.4-5. The Hartford Courant is the largest daily paper in the Hartford area, and its circulation area includes Hartford, Newington and New Britain. J.A. 43.

The next efforts by the Union were a series of trespassory solicitations at the Newington store on June 18. Union organizers placed leaflets on cars parked in the informal employee parking area three different times on June 18, at approximately 10:00 a.m., 5:00 p.m., and at one other time. J.A. 18-20, 22-23. Organizers also entered the store itself. J.A. 18, 30-34, 80-81.

On June 18, whenever Lechmere management discovered the Union organizers in the store or the parking lot distributing literature, they informed the organizers about the no solicitation/no distribution policy and asked them to leave the property, including the parking lot. J.A. 18-20. As with previous violations of the policy (leafletting performed by nearby businesses or other groups, *see* J.A. 59-60), Lechmere management also removed the Union's leaflets left on windshields. J.A. 18-20. This pattern continued on several other days in June and July of 1987. Union organizers repeatedly entered the parking lot and the store to distribute literature, and they

were instructed to leave Lechmere property upon being discovered. J.A. 20-22, 33-34, 35-36. The Union representatives complied with Lechmere's requests, but not immediately. J.A. 21.

At times the parking lot distribution was concentrated in the area informally designated for employee parking. J.A. 18-19. On other days the Union left leaflets across the entire parking lot, beyond Lechmere's property. J.A. 74-75. Customers complained to Lechmere about leaflets left on their cars. J.A. 71, 96. The Union knew where the employees generally parked, and that many employees arrived before the store opened at 10:00 a.m. J.A. 23.

Shortly after the leafletting began, Lechmere inquired about Konover Management Corporation's position concerning such activity in the parking lot. By letter dated June 26, 1987, which was a confirmation of a June 22 telephone call, Konover authorized Lechmere to "prevent the distribution of hand bills, flyers, etc. within the shopping center." J.A. 67-68, 86-87, 140.

During this period the Union placed in the Hartford Courant four more large advertisements aimed at organizing Lechmere employees, and one in the New Britain Herald. J.A. 116; R.4-5. All but one of the advertisements appeared by July 9, 1987. *Id*. Through the end of July, the Union also tried more direct methods to reach employees away from work. J.A. 42.

In Connecticut one can obtain the name and address of the registered owner of an automobile by presenting a license plate number at the Division of Motor Vehicles. J.A. 37, 77-78. At least one employee provided the Union with further information about names and addresses of co-workers. J.A. 42. Using these methods, the Union allegedly obtained names and addresses of forty-one Lechmere employees. Through the use of a computerized mailing list, those employees were sent several mailings at their homes. *Id*. The Union also attempted home visits and telephone calls. J.A. 38-39, 46-47.

The Union was not receiving a strong response from this process and stopped most of these efforts by late July, 1987. J.A. 42. Despite the Union's overall lack of organizing success, there is no doubt that Lechmere employees were aware of the Union's attempts to reach them. Roughly two dozen employees complained to management about the newspaper advertisements. J.A. 78. About two dozen employees complained about receiving Union literature at home. *Id*. About one dozen employees complained about being visited at home by the Union. *Id*. On July 1, only two weeks after the organizing activity began, Lechmere sent a letter to employees openly discussing the Union's handbilling, the newspaper ads, and home contacts. J.A. 91-92, 137-39; R.243-44.

Beginning on August 7, 1987 the Union activity at Newington took a new turn. Union representatives picketed that day and for the remainder of the month at the forty-six foot wide grass strip along the Berlin Turnpike. J.A. 116-17; R.4-5. No longer aiming its efforts exclusively at Lechmere employees, the Union's signs explained to the public that Lechmere was a non-union store. J.A. 43-44. This picketing continued intermittently, but at least several times per month until March of 1988. J.A. 116-17; R.4-5. In addition, the Union placed five more large advertisements in the Hartford Courant expressing its new appeal to the general public. J.A. 116; R.4-5.

During this extended period of picketing, Lechmere never asked or ordered the Union representatives to leave the area along the Berlin Turnpike. J.A. 117; R.4-5. The informal employee parking area was just a few yards away from that location. J.A. 121; R.4-5.

5. *The Excluded Evidence Concerning Other Union Activity At Newington.*

The record contains evidence that the Union representatives both attempted and actually engaged in far more than hand-

billing in the informal employee parking area. They entered the store on some days. J.A. 18, 30-32, 35-36. On other occasions they left leaflets on cars across the entire parking lot. J.A. 74-75.

The ALJ excluded evidence about other disruptive Union activity, despite Lechmere's detailed offers of proof concerning these incidents. Lechmere was prepared to prove that from the very first day of on-site organizing activity (June 18, 1987), Union representatives repeatedly entered the store, and among other things, confronted employees, distributed literature, stuffed literature into merchandise, entered warehouse areas not open to the public, left literature in public restrooms, and caused disturbances by refusing to leave when asked. *See*J.A. 30-34, 54, 55, 79-81, 84-85.

The ALJ also excluded evidence concerning the ease and speed with which the names and addresses of automobile owners can be obtained from the Division of Motor Vehicles in Connecticut. J.A. 77-78.

Finally, the ALJ excluded evidence concerning employee complaints to management about contacts by the Union. J.A. 77-79.

The importance of this excluded evidence will be discussed in Argument, *infra*. Lechmere contends that the Judge's rulings were erroneous and prejudicial, and that the Board and the First Circuit compounded the prejudice in their affirmance.

SUMMARY OF ARGUMENT

Over thirty years ago a unanimous Supreme Court ruled that union organizers could not trespass on an employer's property to contact the workforce unless the employees were inaccessible and "beyond the reach" of less intrusive, nontrespassory methods of communication, such as the mail, advertised meetings, contacts on the streets and at home, and

telephone calls. *NLRB* v. *Babcock & Wilcox Co.*, 351 U.S. 105, 107 n.1, 111-14 (1956). The Supreme Court has since offered little basis to depart from the *Babcock & Wilcox* principle that trespassing will not be condoned except where the "usual channels" of communication do not enable a union to "reach" the target workforce. *See id.* at 112. Though not squarely on point, the intervening cases bolster rather than diminish the original *Babcock & Wilcox* holding. *See Sears, Roebuck & Co.* v. *San Diego County Council of Carpenters*, 436 U.S. 180 (1978); *Hudgens* v. *NLRB*, 424 U.S. 507 (1976); *Central Hardware Co.* v. *NLRB*, 407 U.S. 539 (1972). *Dicta* from *Sears* sums up the Court's view: it is the "general rule" that an employer may bar non-employee union organizers from his property, authorized trespass has been rare, and to gain access the union must satisfy a "heavy" burden of showing that "no other reasonable means of communicating its organizational message to employees exists." *Sears*, 436 U.S. at 205.

Jean Country, 291 N.L.R.B. No. 4, 129 L.R.R.M. (BNA) 1201 (1988) is the latest of many attempts by the Board to expand *Babcock & Wilcox*. After *Jean Country*, the Board analyzes three shifting and unpredictable sets of facts to determine whether an employer can lawfully eject trespassing union agents: (1) the "strength" of the property right, generally equating to the purpose for which the property is used; and (2) the "strength" of the Section 7 rights exercised by the union, with organizational rights among the strongest; and (3) the availability of reasonable alternative means for the union to communicate its intent.

The *Jean Country* analysis fails to follow the applicable law. Rather than generally deferring to property rights, as *Babcock & Wilcox* commanded, *Jean Country* substitutes a completely relative contest between rights of seemingly equal standing. Secondly, the *Jean Country* analysis routinely results in a finding of "weakened" property rights simply because the prop-

erty owner invites the public onto the premises. Coinciding with this development is the Board's conclusion that available communication methods of "diluted" effectiveness will be enough to justify trespassing. The net result is that a Section 7 right is now more likely than not to prevail over the property rights of an employer patronized by the general public, a trend not rooted in *Babcock & Wilcox*.

The *Jean Country* analysis also plays havoc with the Supreme Court's directive that General Counsel bears a "heavy" burden in this type of case. First, the union's lack of success in organizing has implicitly become a factor in judging whether trespass is warranted. Second, the Board accepts conjecture, presumptions, partial facts, and unsupported conclusions to demonstrate the supposed lack of reasonable alternative means to reach employees. Third, the Board finds "unreasonable" certain methods of communication because they are "flawed" and not a "comprehensive" source of employee identities. This substantially lowers the *Babcock & Wilcox* burden of showing that there are no alternative means merely to reach employees. Finally, in some respects the Board even shifts the burden to the employer to prove the existence of alternatives to trespass.

Jean Country's impermissible departure from *Babcock & Wilcox* is fully demonstrated in its application. Board case law shows that infringement on property rights has become the rule, not the exception. The Board in *Lechmere, Inc.* even authorized trespass despite a strong showing that the Union was seriously abusing the Section 7 rights it sought to assert by repeated, disruptive conduct in and around Lechmere's store.

There is no reason for judicial deference to the *Jean Country* analysis and its application in *Lechmere, Inc.* The Board

has attempted to resurrect the discredited analysis and result that mirror the very circumstances leading to the Supreme Court's *Babcock & Wilcox* decision. The Board has announced no changing patterns of workplace life influencing the *Jean Country* approach, and if anything it is easier at present to reach employees than in 1956. Less deference is also warranted to an inconsistent agency view. The *Jean Country* analysis, including its application in *Lechmere, Inc.*, caps a long history of inexplicable inconsistency in the Board's treatment of *Babcock & Wilcox*.

The Court should reaffirm *Babcock & Wilcox* principles, making authorized trespass under Section 7 a rare exception to the general rule that property rights prevail. The General Counsel's burden to justify an authorized trespass should be made truly heavy. *Babcock & Wilcox* protected the right of *employees* to become aware of the existence and potential benefits of unionization. *Jean Country*, at the expense of property rights, protects and expands the ability of *unions* to get closer to a workforce that may simply be unreceptive to the union's appeal. As the *Babock & Wilcox* Court stated, the difference between employees' rights and union organizers' rights is "one of substance." *Babcock & Wilcox*, 351 U.S. at 113.

ARGUMENT

I. The *Jean Country* Analysis Fails To Follow The Applicable Law.

A. Jean Country *Erroneously Fails To Adopt The Strict* Babcock & Wilcox *Protection Of Property Rights.*

In 1956 the Supreme Court fashioned a rule to determine when non-employee union organizers could trespass on private property to engage in protected concerted activities. *See*

NLRB v. Babcock & Wilcox Co., 351 U.S. 105 (1956) (a unanimous decision by eight Justices). The Court expressly prohibited trespassing by union organizers except in situations where the target employees were inaccessible and "beyond the reach" of less intrusive, non-trespassory methods of communication, such as the mail, advertised meetings, contacts on the streets and at home, and telephone calls. *Id.* at 107 n.1, 111-14.

The *Babcock & Wilcox* Court was reviewing a 1954 NLRB decision involving union organizers' attempts to organize a factory workforce outside a small town. *Babcock and Wilcox Co.*, 109 N.L.R.B. 485, 34 L.R.R.M. (BNA) 1373 (1954). The factory was adjacent to a highway and surrounded by private property, so the union eventually sent its agents into the parking lot to meet employees face-to-face. Babcock & Wilcox did not permit this trespass and the union filed an unfair labor practice charge.

In its 1954 decision, the Board ruled that it was "impossible or unreasonably difficult" for the union to reach the Babcock & Wilcox workforce at these particular premises by methods less intrusive than trespassing. To remove an "unreasonable impediment" to self-organization, the Board ordered that the union must have access to the factory parking lot and nearby walkways which were on private property. *Babcock and Wilcox Co.*, 109 N.L.R.B. at 493-94, 34 L.R.R.M. (BNA) at 1374. The Court of Appeals denied enforcement of the Board's Order. *NLRB* v. *Babcock & Wilcox Co.*, 222 F.2d 316 (5th Cir. 1955).

The Supreme Court also rejected the Board's Order. *Babcock & Wilcox*, 351 U.S. at 112. The Court ruled that even reasonable, limited trespassing could not be mandated by the Board "if reasonable efforts by the union through other available channels of communication will enable it to reach the employees with its message," and if the employer "did not discriminate against the union by allowing other distribution." *Id.* The Court concluded that an employer "must allow the union to approach his employees on his property" when "the location of a plant and the living quarters of the employees place the employees beyond the reach of reasonable union efforts to communicate with them." *Id.* at 113.

The Supreme Court has offered little basis to depart from the *Babcock & Wilcox* principle that trespassing will not be condoned except where truly necessary — where the "usual channels" of communication do not enable a union to "reach" the target workforce. *See id.* at 112. The Supreme Court cases since *Babcock & Wilcox*, though not squarely on point, have tended to bolster rather than diminish the vitality of the original *Babcock & Wilcox* holding.

In *Central Hardware Co. v. NLRB*, 407 U.S. 539 (1972), the Court held that *Babcock & Wilcox* principles would determine whether a hardware store could lawfully eject non-employee union organizers from its parking lot, rather than the broad First Amendment principles discussed in *Amalgamated Food Employees Union Local 590* v. *Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968). In *Logan Valley Plaza*, the Court had expanded the very limited principle that First Amendment criteria protected religious solicitation in a "company town," to apply First Amendment rights to peaceful picketing at a privately owned shopping mall. In *Central Hardware*, both the Board and the Court of Appeals applied only *Logan Valley Plaza* to find that union organizers could trespass on a retail store's parking lot. The Supreme Court vacated and instructed that on remand *Babcock & Wilcox* principles should govern. The Court gave no indication of how *Babcock & Wilcox* would apply to the facts.

In *Hudgens* v. *NLRB*, 424 U.S. 507 (1976), the Court's opinion was largely devoted to clarifying its prior opinion in *Lloyd Corp.* v. *Tanner*, 407 U.S. 551 (1972), and overruling *Logan Valley Plaza*. Again, there had been considerable reliance upon *Logan Valley Plaza* in the proceedings below,

and the Court vacated and remanded. The Court, however, did affirm the accommodation principles of *Babcock & Wilcox*. *Hudgens* involved economic strike activity by Butler Shoe Company employees on a third party's private property, a shopping mall housing a Butler Shoe retail store. This setting was significantly different from *Babcock & Wilcox*. The Court stated that these facts "may or may not be relevant [to the Board] in striking the proper balance" between property rights and Section 7 rights. *Hudgens*, 424 U.S. at 522-23.

Finally, in *Sears, Roebuck & Co. v. San Diego County Council of Carpenters*, 436 U.S. 180 (1978), the Court upheld a ruling by the California Supreme Court that the Act did not preempt a state court injunction against a union's trespassory "area standards" picketing. To resolve the preemption issue, the Court examined whether the picketing on private property was arguably prohibited under Section 8 or arguably protected under Section 7 of the Act. The Court analyzed the case under *Babcock & Wilcox* in deciding that the picketing was not arguably protected, stating in *dicta*:

> [W]hile there are unquestionably examples of trespassory union activity [that might be protected under Section 7], experience under the Act teaches that such situations *are rare and that a trespass is far more likely to be unprotected than protected*.
>
> Experience with trespassory organizational solicitation by non-employees is instructive in this regard. While *Babcock* indicates that *an employer may not always bar non-employee union organizers from his property, his right to do so remains the general rule*. To gain access, the union has the burden of showing that *no* other reasonable means of communicating its organizational message to employees *exists* or that the employer's access rules discriminate against the union solicitation. *The burden . . . is a heavy one . . .* [and the balance] *has rarely been in favor of trespassory organizational activity*.

Sears, 436 U.S. at 205 (emphasis added).

Thus, the Court has remained true to the *Babcock & Wilcox* accommodation that allows trespassing only when the target workforce is inaccessible and cannot be reached by the usual channels of non-trespassory communication. In *Central Hardware* and *Hudgens* the Court repeated the *Babcock & Wilcox* generality that neither property rights nor Section 7 rights are absolute, and that the Board has primary responsibility for accommodating the two. *Central Hardware*, 407 U.S. at 544-45; *Hudgens*, 424 U.S. at 522; *see Babcock & Wilcox*, 351 U.S. at 112. The Supreme Court has never hinted, however, that the *Babcock & Wilcox* accommodation formula was too restrictive of Section 7 rights and ought to be changed. On the contrary, the *dicta* in *Sears* that legitimate trespassory organizational activity will be "rare" is the most natural application of *Babcock & Wilcox*.

Nonetheless, the Board has periodically attempted to expand *Babcock & Wilcox*. *See Lechmere, Inc.*, 914 F.2d at 329-30 (Torruella, J., dissenting), Pet. A-31—A-32; *see also* Section III(C), *infra*. The latest attempt is *Jean Country*, 291 N.L.R.B. No. 4, 129 L.R.R.M. (BNA) 1201 (1988). As its basis in law for this new *Jean Country* accommodation, the Board relied chiefly upon the following language from *Hudgens* to justify an attempt effectively to circumvent *Babcock & Wilcox*: "The locus of that accommodation [between property rights and Section 7 rights] . . . may fall at differing points along the spectrum depending on the nature and strength of the respective §7 rights and private property rights asserted in any given context." *See Jean Country*, 291 N.L.R.B. No. 4, slip op. at 4-5, 129 L.R.R.M. (BNA) at 1203 (citing *Hudgens*, 424 U.S. at 522).

After *Jean Country*, the Board now analyzes three shifting and unpredictable sets of facts to determine whether an employer can lawfully eject trespassing union agents: (1) the "strength" of the employer's property right; (2) the "strength"

of the Section 7 rights exercised by the union[4]; and (3) the availability of reasonable alternative means for the union to achieve its intent. *See Jean Country*, 291 N.L.R.B. No. 4, slip op. at 9-10, 129 L.R.R.M. (BNA) at 1205.

The thrust of *Babcock & Wilcox* unmistakably was to leave intact the usual private property rights, except where unusual circumstances required trespassing. The *Babcock & Wilcox* Court noted that the Act did not endow the NLRB with authority to "impose a servitude on the employer's property." *See Babcock & Wilcox*, 351 U.S. at 108. *Jean Country* fails to give the deference to property rights mandated by the Supreme Court, and substitutes instead a completely relative contest between rights of seemingly equal standing. *See Lechmere, Inc.*, 914 F.2d at 321, Pet. A-14 (describing the NLRB's latest attempt at accommodation as "[gathering] three interdependent bundles of facts . . . [tying] them together, and [weighing] them in the aggregate").

When the *Babcock & Wilcox* Court ordered the Board to accommodate these two rights, it did not mean that each right should be given equal weight. The only fair reading of *Babcock & Wilcox* is that the balance must be skewed in favor of private property rights.[5] There can be no doubt after *Sears* that was the intent. *Sears*, 436 U.S. at 205. By ignoring and even reversing that balance, the Board effectively imposes an easement in favor of union solicitation upon innumerable unsuspecting property owners, even those who, like Lechmere, have uniformly forbidden all solicitation. In this way, *Jean Country* and its progeny commit the same error found in the

[4] Organizational activity, for example, is considered a strong right, while area standards handbilling is considered to be among the weaker Section 7 rights.

[5] Some commentators agree that *Babcock & Wilcox* did not create a completely relative "balancing test"; but rather, that the Court itself has balanced the competing rights permanently in favor of the property owner, allowing access for Section 7 activity only when the union can meet a strict threshold of necessity to trespass. *See* Note, 104 HARV. L. REV. 1407, 1411 (1991).

cases underlying *Babcock & Wilcox* — failure to make a "distinction between the rules of law applicable to employees and those applicable to non-employees." *Babcock & Wilcox*, 351 U.S. at 113.

Jean Country impermissibly compromises property rights in more subtle ways through certain of the factors selected to analyze the relative strength of the competing interests.

First, to assess the "strength" of a property right, the Board will consider "restrictions, if any, that are imposed on public access to the property." *Jean Country*, 291 N.L.R.B. No. 4, slip op. at 8, 129 L.R.R.M. (BNA) at 1204. The import is clear in context — employers with premises open to the public have diminished private property rights. Thus, while nominally pronouncing that Lechmere has "relatively substantial" property rights at Newington, the Board also noted that "the parking lots are essentially open to the public." *Lechmere, Inc.*, 295 N.L.R.B. No. 15, slip op. at 4, 7, 131 L.R.R.M. (BNA) at 1481, Pet. B-4. *Babcock & Wilcox* identified the property right in question to be "the right to exclude from property." 351 U.S. at 112; *see supra* note 3. Employers exercise this right by forbidding unwanted solicitation or other unwanted guests. The Board has chosen to diminish the right to *exclude* merely because an employer exercises its coexisting and equally secure right to *invite* patrons for the purpose of transacting business. *See Eastex, Inc.* v. *NLRB*, 437 U.S. 556, 580 (1978) (Rehnquist, J., dissenting). *Babcock & Wilcox* did not contemplate this mutual exclusivity.

Second, after *Jean Country*, to assess the availability of reasonable alternative means, the Board will consider "most significantly, the extent to which exclusive use of the nontrespassory alternatives would dilute the effectiveness of the message." *Jean Country*, 291 N.L.R.B. No. 4, slip op. at 9, 129 L.R.R.M. (BNA) at 1205.

But for semantic differences this is an echo of an important part of the Board's approach struck down thirty-five years ago

in *Babcock & Wilcox*. *Babcock & Wilcox* did not allow "diluted effectiveness" of alternative means of communication to justify trespassory Section 7 activity. The *Babcock & Wilcox* Court expressly rejected the Board's view, even though it was "reasonable" (351 U.S. at 112), that "the place of work [is] so much more effective a place for communication of information that . . . the employer [is] guilty of an unfair labor practice for refusing limited access to company property to union organizers." *Babcock & Wilcox*, 351 U.S. at 107-08. By returning to an analysis that inquires whether alternative methods of communication are "diluted" in their "effectiveness," the Board has revived a viewpoint that the *Babcock & Wilcox* Court disavowed.

The combination of these two *Jean Country* factors—that employers whose property is open to the general public have suffered a self-inflicted wound to their property rights, and that alternate means of communication may not be reasonable if their effectiveness is diluted—adds to the erosion of the property rights that *Babcock & Wilcox* attempted to protect. A Section 7 right is now more likely than not to prevail over the property rights of an employer patronized by the general public. *See infra* Argument II. A.

Board cases decided since *Jean Country* are illustrative. Barring unusual circumstances, the Board routinely decides that Section 7 rights exercised by non-employees will prevail over property rights where the property is "essentially open to the public," or not a "private, non-retail setting."[6] This trend has strong overtones of a revival of the discredited First Amendment analysis from *Amalgamated Food Employees Union Local 590* v. *Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968), overruled by *Hudgens* v. *NLRB*, 424 U.S. 507 (1976).

[6] *See Sentry Markets, Inc.*, 296 N.L.R.B. No. 5, 132 L.R.R.M. (BNA) 1001 (1989), *enforced*, 914 F.2d 113 (7th Cir. 1990); *Dolgin's, A Best Co.*, 293 N.L.R.B. No. 102, 131 L.R.R.M. (BNA) 1159 (1989); *Mountain Country Food Store, Inc.*, 292 N.L.R.B. No. 100, 130 L.R.R.M. (BNA) 1329 (1989); *Target Stores*, 292 N.L.R.B. No. 93, 130 L.R.R.M. (BNA) 1331 (1989).

B. *The* Jean Country *Analysis Disregards The Supreme Court's Directive That The General Counsel Has A "Heavy" Burden To Justify Trespassing, And Permits Trespass Without The Necessary Showing Of Inability To Reach The Employees.*

Babcock & Wilcox requires the General Counsel to show that union organizers are unable to reach employees before a trespass will be protected. That burden is a "heavy" one. *Sears*, 436 U.S. at 205. Through a combination of factors the *Jean Country* analysis has virtually eliminated this heavy burden, and trespass can now quite readily be authorized even when the target workforce can be — or actually has been — reached by the union.

1. *The Union's Lack Of Success Has Implicitly Become A Factor In Judging Whether Trespass Is Warranted.*

Babcock & Wilcox instructed the Board to determine only whether union organizers can "reach" employees without trespassing. After *Jean Country* the Board considers "the extent to which exclusive use of non-trespassory alternatives would *dilute the effectiveness of the message*." *Jean Country*, 291 N.L.R.B. No. 4, slip op. at 9, 129 L.R.R.M. (BNA) at 1205 (emphasis added). The distinction is crucial. The *Babcock & Wilcox* Court was not concerned with "how" the message was received, only "whether" it could have been received. An analysis of whether the "effectiveness" of a message is "diluted" subtly allows property rights to be compromised because the employees do not react to the message.

The ALJ in *Lechmere, Inc.* recognized this distinction. He decided the case under *Fairmont Hotel*, 282 N.L.R.B. 139, 123 L.R.R.M. (BNA) 1257 (1986), and was not required to evaluate the reasonableness of the available alternative means

to communicate with Lechmere's workforce. The ALJ nonetheless concluded in *dicta* that there *were* adequate alternative means by which the Union could reach Lechmere employees. *Lechmere, Inc.*, 295 N.L.R.B. No. 15, slip op. at 10 (ALJ opinion), Pet. B-24. ALJ Biblowitz correctly noted that "[t]he fact that a large majority of the employees rejected [the Union's] solicitations does not detract from [the fact that reasonable alternative means were available]; *Fairmont* does not require that the Union be successful in its contacts with employees, only that there are reasonable alternative means of communicating with them." *Id.* at 9-10, Pet. B-24.

The Board then decided *Lechmere, Inc.* under *Jean Country*, which had been decided in the interim. The Board ignored the ALJ's conclusion that there were reasonable alternative means, relying on facts in the record such as the Union's inability to compile a reasonably complete list of employees, and the failure of employees to return authorization cards. *Id.* at 5, Pet. B-5. The Board implicitly rejected the ALJ's definition of effectiveness, and made the Union's success an indicator of whether the available non-trespassory means of communication were adequate and effective.

This erroneous approach was largely adopted by the First Circuit. The "badges of [in]effectiveness" cited by the First Circuit included "the union's inability to identify the vast majority of workers despite due diligence, the absence of meaningful opportunities for face-to-face contact, and the union's failed efforts to reach the employees." *Lechmere, Inc.*, 914 F.2d at 323, Pet. A-18—A-19.

Considering the evidence that the Union directly "reached" twenty percent of the workforce, and was undoubtedly visible and known to a much larger percentage, these "badges" reflect lack of employee response, not inability to "reach" employees. The facts showed that there were at least six methods or "means" by which the Union was able to "reach" Lechmere employees: (1) in person, through conversation over the short

distance from public property to the area in which employees parked; (2) with signs, handbills, or posters, from the same location; (3) in person at home, by the simple process of tracing license plate registrations; (4) by mail, through the same source; (5) by telephone, again through this source; and (6) through the large newspaper advertisements voluntarily placed by the Union.

In denying that these collectively were reasonable alternatives to trespass, the Board has lost sight even of its own rule. The Board in *Jean Country* was supposed to look to whether there were reasonably effective "means" of communication, and not whether the communication visited upon employees was effective. *Jean Country*, 291 N.L.R.B. No. 4, slip op. at 9, 129 L.R.R.M. (BNA) at 1205. When determining whether the means employed were effective, one may properly ask: "Could the employees hear what the union was saying?" or "Could they see their signs or leaflets?" One may not ask: "Did they seem to like what the union had to say?" or "How did they respond?"

2. *The Board Accepts Presumptions, Conjecture And Unsupported Opinion As "Proof" On The Issue Of Lack Of Reasonable Alternative Means.*

Under *Babcock & Wilcox* the General Counsel carries the burden of proving that without trespassing on an employer's property, a union will have *no reasonable alternative means* of communicating with its intended audience. 351 U.S. at 113-14. *Jean Country* nominally follows this delegation of the burden of proof. 291 N.L.R.B. No. 4, slip op. at 7, 129 L.R.R.M. (BNA) at 1205. As the present case demonstrates, however, the Board has become extremely lax about the "proof" required to meet this dispositive burden.

First, the Board will accept the weakest of facts and inferences to conclude that alternative communication methods

are unable to reach the employees. On the relative effectiveness of handbilling and displaying signs on the public property near the Lechmere store, the Board almost presumptively concluded that this was an "ineffective and unsafe locale for union activity." *Lechmere, Inc.*, 295 N.L.R.B. No. 15, slip op. at 6, 131 L.R.R.M. (BNA) at 1482, Pet. B-6. Factual support for the "ineffective" aspect of the Board's finding is absent. *See id.* The First Circuit elaborated somewhat, concluding that Lechmere's workforce "reports to work at a place where it is difficult to discern the targeted audience from the multitude of shoppers and persons working for other businesses within the Plaza." *Lechmere, Inc.* v. *NLRB*, 914 F.2d at 322-23, Pet. A-17—A-18.

By presuming the ineffectiveness of the means employed, the Board and the First Circuit virtually ignored important, undisputed facts bearing on the effectiveness of "reaching" Lechmere's workforce from public property. Each morning employees park near the forty-two foot wide public strip, well before the store opens; they depart from the same area at days' end, within one-half hour after closing. J.A. 15, 23, 74, 121; R.4-5. Every day that Union representatives stood on public property, therefore, they were within speaking distance of readily identifiable employees arriving for the day shift and leaving after the evening shift. Even if employees would not approach when beckoned they were clearly able to see the Union's message on signs. Thus, the facts show that the Union could communicate easily with readily identifiable employees leaving and returning to their cars, before and after work.[7] This was far better access to employees than the Supreme Court expressly found reasonable in *Babcock & Wilcox*.

[7] ALJ Biblowitz concluded: "Employees were easily recognized here; they parked in specified areas and arrived at predictable times." Pet. B-24. Union organizer Lisa Meucci testified that she knew where "the employee parking area" was, and that she and fellow organizers "arriv[ed] at the store between 9:15 and 9:30, making sure that the people who parked their cars were employees. The store opened up at ten o'clock, so most people that arrived at the store between 9:30 and 10:00 were employees." J.A. 23.

Factual support for the "unsafe" aspect of the Board's finding consisted of reference to the speed of passing traffic; an inference that "traffic is more than minimal" because "the area is commercial in character"; the lack of a traffic signal or stop sign; and a policeman's caution that the Union representatives should be careful near the street. *Lechmere, Inc.*, 295 N.L.R.B. No. 15, slip op. at 6, 131 L.R.R.M. (BNA) at 1482, Pet. B-6. The First Circuit followed suit on this point. *Lechmere, Inc.* v. *NLRB*, 914 F.2d at 323 n.11, Pet. A-18.

This conclusion did not spring from the facts in the record. The safety issue so heavily emphasized by the Board was not even raised or argued to the Administrative Law Judge. Safety was not a factor mentioned by the Judge in determining that the Union had means to communicate with employees without trespassing. *See* Pet. B-24. There was no evidence that any unsafe condition ever existed. The Union representatives were present for months, using the public property to picket and handbill, and there was no incident that provoked any testimony or evidence about a safety problem. *Compare Sentry Markets, Inc.*, 296 N.L.R.B. No. 5, slip op. at 5-6, 132 L.R.R.M. (BNA) at 1002-03 (1989) (evidence that handbilling on public property caused potential rear-end collisions, obstructed drivers' views, and backed up traffic). The second-hand testimony by Union representatives that, on June 20, 1987, a police officer told them to stay on public property but to be careful about their own safety, does not show that this area was unsafe. No doubt this is good advice whenever people stand near the street, but the only inference to be drawn is that even the police officer did not feel that the locale was unsafe, *per se*.

On the relative effectiveness of tracing license plate numbers to identify employees, the Board found that "[e]mployees *may* use cars that are not registered in their names, *may* car pool together, *may* use alternative means of transportation, or *may* park elsewhere. In addition, part-time

employees *might* not use the parking lot at those times shortly before and after the store's designated opening [sic] hours." *Lechmere, Inc.*, 295 N.L.R.B. No. 15, slip op. at 6, 131 L.R.R.M. (BNA) at 1482, Pet. B-5—B-6 (emphasis added). Despite these "obstacles" the Union obtained forty-one employee names and addresses, which the First Circuit described as a "good faith effort" and both the Board and the First Circuit implied was "diligent." *Lechmere, Inc.* v. *NLRB*, 914 F.2d at 323, Pet. A-18; *Lechmere, Inc.*, 295 N.L.R.B. No. 15, slip op. at 5, 131 L.R.R.M. (BNA) at 1482, Pet. B-5.

The "proof" of ineffectiveness as to this alternative method of communication thus amounts to a string of unsupported conjectures. It is even more tenuous to conclude on this record that the Union made a "diligent" or "good faith effort" to reach employees. The ALJ excluded evidence about the ease and speed with which one can obtain names and addresses using license plates. J.A. 77-78. The absence of this evidence makes it difficult to judge whether the Union's effort was truly diligent. In a similar vein, there was also no evidence about the Union's success *rate* in obtaining the forty-one names and addresses that it claimed to have, or the number of trips to the Motor Vehicle Department that were actually made. J.A. 27. For all that the record shows, the Union may have had a great success rate in tracing the employees via license plate numbers, and simply met a cold response when employees were actually contacted. There was indeed some evidence that employees complained to management about receiving mail, telephone calls, and visits from the Union. J.A. 77-78. The ALJ excluded further evidence that would tend to show that the Union was able to reach employees, but the employees were unreceptive. *Id.*

Finally, on the relative effectiveness of the Union's newspaper advertisements, the Board again resorted to conjecture: "Many of the Respondent's employees *may* never

receive, purchase, or read these local newspapers, or *may* be exposed to them only occasionally." *Lechmere, Inc.*, 295 N.L.R.B. No. 15, slip op. at 6, 131 L.R.R.M. (BNA) at 1482, Pet. B-5 (emphasis supplied). The First Circuit found that "there is no particular reason to believe that many of the affected employees actually saw the ads," and simply repeated that "the Board judged such advertising to be inutile." *Lechmere, Inc.* v. *NLRB*, 914 F.2d at 316, 323, Pet. A-5, A-18.

The effectiveness of glaring, full-page advertisements aimed at the employees of a single employer — particularly employees of a retail store chain, where awareness of advertising will be high — is underestimated by the Board. *See* J.A. 119; R.4-5. Considering the overall relativity of the *Jean Country* analysis and its numerous factors, it seems particularly arbitrary that the Board should summarily dismiss the mass media as an unreasonable alternative means of communication in nearly every case. *See Jean Country*, 291 N.L.R.B. No. 4, slip op. at 8, 129 L.R.R.M. (BNA) at 1204. A large advertisement, which may provoke private telephone calls or even the submission of a clip-out authorization card, is not necessarily any less effective than direct contact at the place of employment, and perhaps may be even *more* effective. As Judge Torruella stated: "[U]nder the guise of fact-finding and 'expertise,' [the Board] in one clean swoop not only wipes out [the *Babcock & Wilcox* directive that the availability of the 'usual' methods of publicity must be assessed in this accommodation] but [also] declares inexistent and impotent 'the usual methods of imparting information' used by the entire advertising and publicity industry." *Lechmere, Inc.* v. *NLRB*, 914 F.2d at 328, Pet. A-28 (Torruella, J., dissenting).

In addition, the facts in this case indicate that the newspaper ads should not have been completely discounted as a means to communicate with Lechmere's employees. The Union chose a newspaper advertisement as the first organizing

tactic on June 16, 1987, closely followed by several more. J.A. 116, 119; R.4-5. This can only mean that the Union itself had faith in their potential effectiveness.

When a union elects to employ full-page newspaper advertisements aimed at a specific group of employees, it is not fitting to label such an effort as a "flawed" means of communication due to greater expense and effort. *Cf. Jean Country*, 291 N.L.R.B. No. 4, slip op. at 8, 129 L.R.R.M. (BNA) at 1204. Only two months after deciding *Lechmere, Inc.*, the Board concluded that a union had reasonable alternatives to trespassing because it chose to use a mass media campaign of radio and television commercials in conjunction with picketing and handbilling at the perimeters of stores. *The Red Food Stores, Inc.*, 296 N.L.R.B. No. 62, 132 L.R.R.M. (BNA) 1164 (1989). The Board stated its reluctance to impose the cost of a media campaign upon the union, but as a voluntary undertaking this effort was considered part of the "reasonable alternative means" analysis. *Id.* slip op. at 10-11, 132 L.R.R.M. (BNA) at 1167-68. Lechmere deserved the same consideration.

In a related conclusion about the alleged inefficacy of newspaper advertising in this case, the Board cited ambiguous testimony to the effect that Lechmere "removed the advertisements from the newspapers delivered to this store," apparently to indicate that deliberate censorship further interfered with alternative means of communication. *Lechmere, Inc.*, 295 N.L.R.B. No. 15, slip op. at 5 n.9, 131 L.R.R.M. (BNA) at 1482 n.9, Pet. B-5. The First Circuit concluded that Lechmere "systematically removed the ads from newspapers delivered to its Newington store." *Lechmere, Inc.* v. *NLRB*, 914 F.2d at 316, Pet. A-5.

Like so much else in the General Counsel's "facts" about the availability of reasonable alternative means, these conclusions are nothing more than unfounded inference. The actual testimony was very brief: the General Manager removed the Union's ads *and* retail competitors' ads from the Hartford

Courant delivered to the store. J.A. 96. There was no evidence that he did so *before* employees saw the ads, or that he deliberately censored all papers delivered to the store, or that he hid the ads from employees after he removed them from the paper. Any inference of censorship was further dispelled by the fact that only two weeks after organizing activity began, Lechmere sent a July 1, 1987 letter to employees containing a heading, "Newspaper Ads," and stating, "you may have noticed the coupons that have appeared in the newspaper ads...." J.A. 91-92, 137-39; R.243-44.

The Board has broad investigatory powers.[8] To meet its burden of showing that no reasonable alternatives to trespass enabled the Union to reach Lechmere's employees, the General Counsel could have *asked* employees directly whether the Union's various forms of communication reached them. The Board's approach since *Jean Country* substitutes patronizing speculation and opinion for the actual experiences of employees, virtually eliminating the *Babcock & Wilcox* burden of proof.

3. *The Board Has Created An Impermissibly Low Standard For Establishing That The Use Of Alternative Communication Methods Is Not Reasonable.*

In addition to allowing unfounded inferences, conjecture and partial facts to satisfy the General Counsel's burden of proof, the Board and the First Circuit have given strong indications that a new and impermissibly easy standard for the

[8] The NLRB Casehandling Manual describes the investigation of an unfair labor practice charge as follows:

> It is the responsibility of the Board agent to take steps necessary to ascertain the truth of the allegations of a charge. The Board agent should exhaust all lines of pertinent inquiry, whether or not they are within the control of, or are suggested by, the charging party....[T]he Board agent should take all investigative steps, short of "fishing," in areas reasonably calculated to bring results.

NLRB Casehandling Manual §10056.4

"unreasonableness" of a communication method has emerged. The Board found that tracing license plate numbers to obtain names and addresses was *not* a reasonable alternative means to contact employees because: (1) this method is "flawed"; (2) "obstacles to comprehensive tallying of names and addresses are manifest"; and (3) the Motor Vehicle Registry is not effective as a "comprehensive source of the names and addresses of the employees." *Lechmere, Inc.*, 295 N.L.R.B. No. 15, slip op. at 5-6, 131 L.R.R.M. (BNA) at 1482, Pet. B-5—B-6. The First Circuit intimated likewise, citing Lechmere's "unwillingness to disclose the names and addresses of workers" (an inference on which there was no actual evidence because the Union never asked; J.A. 76), and describing accessibility to the workforce in terms of whether a union can obtain the names and addresses of employees through an employer-furnished list or otherwise. *Lechmere, Inc.* v. *NLRB*, 914 F.2d at 323 n.12, Pet. A-18—A-19.

This line of reasoning sets a new standard for what will constitute a "reasonable" alternative means of communication. "Flawed" methods that are not a "comprehensive source," or will not allow "comprehensive tallying of names and addresses", apparently will be considered enough to justify trespassing. The alternative means of communication found to be reasonable in *Babcock & Wilcox* (contacts on the street and at home, telephone calls, mail, and notices of meetings) were equally "flawed" using today's definition, and by no means constituted a "comprehensive source" for "comprehensive tallying of names and addresses." Indeed, nothing short of an employee list furnished to the Union would be a "comprehensive" alternative means for achieving employee contact.

By equating the concept of "reasonable" alternatives with "comprehensive" sources of names and addresses, the Board substantially departed from *Babcock & Wilcox* and even its own case law. *See Hardee's Food Systems, Inc.*, 294 N.L.R.B. No. 48, slip op. at 6, 131 L.R.R.M. (BNA) 1345, 1346 (1989)

(trespass is prohibited where reasonable alternatives are available, even if the alternatives are "not the *most* effective means") (emphasis supplied). The Board has, in effect, concluded that an alternative method to contact employees was unreasonable because it was not the *most* effective method.

4. *The* Babcock & Wilcox *Burden Of Proof Has Been Partially Shifted To Require The Employer To Show That Reasonable Alternative Communication Methods Existed.*

Finally, the First Circuit in *Lechmere, Inc.*, not only diluted the General Counsel's burden of proof of an unfair labor practice, but also to some extent shifted that burden onto the charged party, by noting that "there is no particular reason to believe that many of the affected employees actually saw the [newspaper] ads." *Lechmere, Inc.*, 914 F.2d at 316, Pet. A-5. The General Counsel carries the burden under *Babcock & Wilcox* to prove that the employees in fact did not see the ads, and hence were not reached. Any guesswork about this issue should not work against the party who bears no burden of proof.

The federal appellate courts have in the past felt it necessary to spurn the Board's attempts to shift this burden onto property owners. *See Belcher Towing Co.*, 238 N.L.R.B. 446, 474-78, 99 L.R.R.M. (BNA) 1566 (1978), *enforcement denied in relevant part*, 614 F.2d 88 (5th Cir. 1980), *remanded*, 256 N.L.R.B. 666, 107 L.R.R.M. (BNA) 1300 (1981), *rev'd* 683 F.2d 418, (11th Cir. 1982); *Sabine Towing & Transportation Co., Inc.*, 205 N.L.R.B. 423, 84 L.R.R.M. (BNA) 1275 (1973), *enforcement denied in relevant part*, 599 F.2d 663 (5th Cir. 1979). The shifting burden of proof is yet another indication of how far from *Babcock & Wilcox* the Board has taken this analysis.

Jean Country paid lip service to the *Babcock & Wilcox* principles by describing the General Counsel's burden as follows: "What is required is a clear showing, based on objective considerations, rather than subjective impressions, that reasonably effective alternative means were unavailable." *Jean Country*, 291 N.L.R.B. No. 4, slip op. at 7, 129 L.R.R.M. (BNA) at 1204. The "objective" considerations relied upon in this case were a series of opinions and conjectures about why employees *might* not have been reached by the Union's message. At least in part, the employees' failure to react to the Union's highly visible organizing efforts was construed to mean that the available channels of communication were not reasonable for protecting Section 7 rights. Alternative communication methods were deemed not reasonably effective because the Union could not easily and quickly compile a complete roster of Lechmere's employees.

This approach to the General Counsel's burden of proof all but guarantees protection for a union's trespassory organizational efforts in the large majority of cases. It creates a *de facto* reversal of *Babcock & Wilcox*, and belies the Court's characterization of this burden as "heavy."

II. *Jean Country* As Applied Betrays The General Rule Protecting Property Interests.

A. *The Board's Case Law Trends Since* Jean Country *Make Infringement On Property Rights The Rule, Not The Exception.*

Jean Country as applied is obviously circumventing *Babcock & Wilcox*. In the overwhelming majority of cases in which the Board conducted a *Jean Country* accommodation analysis to determine whether a property owner violated Section 8(a)(1) by denying access to union agents, the Board

ruled that a violation had occurred.[9] Infringement on property rights has become the rule.

This may be attributable to the Board's failure after *Jean Country* to give sufficient deference to property rights, or to its failure to require a true showing of the necessity for trespass. Whatever the source, this trend has no basis in *Babcock & Wilcox*. Despite earlier pronouncements to the contrary, the Board has now distorted its application of *Babcock & Wilcox* to create a test that abrogates property rights merely because in most cases it is more convenient for unions to conduct Section 7 activity on private property than by using other means. *Cf. Monogram Models, Inc.*, 192 N.L.R.B. 705, 706, 77 L.R.R.M. (BNA) 1913, 1914 (1971) ("the test established [in *Babcock & Wilcox*] was not one of relative convenience").

B. *In Authorizing Trespassory Access The Board And The First Circuit Failed To Account For The Effect Of The Union Abusing The Exercise Of Section 7 Rights.*

In *Jean Country* the Board instructed that the strength of a

[9] *See e.g., Target Stores*, 300 N.L.R.B. No. 136 (1990); *Wegmans Food Markets, Inc.*, 300 N.L.R.B. No. 114 (1990); *Sparks Nugget, Inc.*, 298 N.L.R.B. No. 69, L.R.R.M. (BNA) 1121 (1990); *Little & Co.*, 296 N.L.R.B. No. 89, 132 L.R.R.M. (BNA) 1173 (1989); *Sentry Markets, Inc.*, 296 N.L.R.B. No. 5, 132 L.R.R.M. (BNA) 1001 (1989), *enforced* 914 F.2d 113 (7th Cir. 1990); *Mayer Group, Inc.*, 296 N.L.R.B. No. 9, 132 L.R.R.M. (BNA) 1005 (1989); *C.E. Wylie Const. Co.*, 295 N.L.R.B. No. 119, 132 L.R.R.M. (BNA) 1007 (1989); *Subbiondo and Assocs., Inc.*, 295 N.L.R.B. No. 132, 132 L.R.R.M. (BNA) 1006 (1989); *Granco, Inc.*, 294 N.L.R.B. No. 7, 131 L.R.R.M. (BNA) 1325 (1989); *Trident Seafoods Corp.*, 293 N.L.R.B. No. 125, 131 L.R.R.M. (BNA) 1247 (1989); *Dolgin's, A Best Co.*, 293 N.L.R.B. No. 102, 131 L.R.R.M. (BNA) 1159 (1989); *Target Stores*, 292 N.L.R.B. No. 93, 130 L.R.R.M. (BNA) 1331 (1989); *Mountain Country Food Stores, Inc.*, 292 N.L.R.B. No. 100, 130 L.R.R.M. (BNA) 1329 (1989); *Sahara Tahoe Corp.*, 292 N.L.R.B. No. 86, 131 L.R.R.M. (BNA) 1021 (1989); *W.S. Butterfield Theatres, Inc.*, 292 N.L.R.B. No. 8, 130 L.R.R.M. (BNA) 1113 (1989).

Comparatively, there is a remarkably small number of cases in which the Board has applied a pure *Jean Country* analysis and ruled that access should be denied. *See e.g., Red Food Stores*, 296 N.L.R.B. No. 62, 132 L.R.R.M. (BNA) 1164 (1989); *Hardee's Food Systems, Inc.*, 294 N.L.R.B. No. 48, 131 L.R.R.M. (BNA) 1345 (1989).

Section 7 right must be judged in part by "the manner in which the activity related to the right is carried out," and that a union can by misconduct "diminish" the strength of Section 7 rights. 291 N.L.R.B. No. 4, slip op. at 8, 20-21, 129 L.R.R.M. (BNA) at 1204, 1208. In the instant case there was evidence that the Union's organizing tactics included repeated trespassing into all areas of the parking lot and into the Lechmere store itself. *See* J.A. 18, 30-32, 35-36, 74-75. There was no further evidence about disruptive or inconvenient organizing tactics because the ALJ refused to allow such evidence into the record. The ALJ rebuffed Lechmere's offers of proof that Union representatives entered the store and confronted employees, distributed literature, stuffed literature into merchandise, entered warehouse areas not open to the public, left literature in restrooms and caused disturbances. *See* J.A. 30-34, 54, 55-56, 79-81, 84-85.

The Board then compounded this error by declaring that Lechmere's "assertions" about Union misconduct were not "evidence of . . . disruption or inconvenience." *Lechmere, Inc.*, 295 N.L.R.B. No. 15, slip op. at 4 & n.7, 131 L.R.R.M. at 1482 n.7, Pet. B-4. The First Circuit enforced the Board's order in part because "[p]ermitting non-disruptive or minimally disruptive trespass constitutes a much gentler accommodation than insisting that a property right yield to organizational activity which threatens the normal operations of the owner's business." *Lechmere, Inc.* v. *NLRB*, 914 F.2d at 324, Pet. A-21. The Court of Appeals agreed "with other courts that in a trespassory solicitation case the extent of the union's intrusion affects whether the property right should prevail." *Id.*, Pet. A-21.

It requires a blind eye to find that the Union's trespassory organizational activity was non-disruptive, or minimally disruptive, or did not threaten the store's normal operations. It is speculative to assert a cause-and-effect relationship; *i.e.*, that Union agents entered the store only after, and because,

they were prevented from handbilling in the parking lot and at the store entrances.[10] Such a relationship would neither excuse nor lessen the impact of the Union's conduct in any event. It is equally possible that there was no causal relationship, and the Union would have entered the store even if it enjoyed a closer staging area on Lechmere's property.

There is a double standard at work. On one hand, Lechmere was held accountable for a single alleged attempt to move Union organizers from public property, despite the minimal effect this had on the Union's organizing efforts and the Union's ability to remain on the scene for months, without further incidents of such alleged interference.[11] *See Lechmere, Inc.* v. *NLRB*, 914 F.2d at 325, Pet. A-22—A-23. This is because "events must be judged in context," and "[a]ny course of conduct, no matter how enduring or persuasive, can be broken down into tiny particles and made to seem relatively benign." *Id.*, Pet. A-23.

On the other hand, the Union has not been held accountable for the entire context in which it attempted to organize Lechmere's employees, which included several instances of unjustified and disruptive misconduct. Only when broken down into tiny particles was this organizing campaign relatively benign.

The *Jean Country* analysis, with its balancing of rights, is analogous to a classic equitable test. The Union came before the Board with "unclean hands" — seeking to compromise Lechmere's recognized property rights, while at the same time repeatedly violating those rights beyond any justification. The Board both excluded and ignored evidence about these facts. The First Circuit approved. This application of the *Jean Country* analysis was arbitrary and not supported by substan-

[10] The General Manager remembered that the very first on-site organizing activity on June 18, 1987 involved a foray into the store. J.A. 80.

[11] Lechmere has not made this minor unfair labor practice finding part of its Petition for Writ of Certiorari.

tial evidence on the record as a whole. *See Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 488 (1951).

III. Deference To The Board Is Not Warranted.

A. Lechmere, Inc. *Is Not Distinguishable From The Decision Overturned By The Court Thirty-Five Years Ago In* Babcock & Wilcox.

Deference to the Board ultimately motivated the First Circuit's decision. *See Lechmere, Inc.*, 914 F.2d at 317, 325, Pet. A-7—A-8, A-21—A-22. The Board is entitled to some deference in assessing industrial reality, but when the Board "alters the balance of a framework carefully laid out by Congress and thoughtfully implemented by well-established Supreme Court doctrine," it is a judicial function to remedy the imbalance. *Lechmere, Inc.*, 914 F.2d at 326-27 (Torruella, J., dissenting), Pet. A-24 (citing *NLRB* v. *Curtin Matheson Scientific, Inc.*, 110 S. Ct. 1542, 1554 (1990) (Rehnquist, C.J., concurring)). The decision of the First Circuit is almost a perfect resurrection of the Board's position rejected by the Supreme Court in *Babcock & Wilcox*. *See Lechmere, Inc.*, 914 F.2d at 326-27 (Torruella, J., dissenting), Pet. A-24—A-25. The 1954 Board decision of *Babcock and Wilcox Co.* bears a surprising resemblance to the Board's 1989 treatment of *Lechmere, Inc.* Judge Torruella emphasized this similarity in his detailed discussion and chart comparing nine important factors. *Id.* at 327 (Torruella, J., dissenting), Pet. A-26. The Board's *deja vu* is troubling because the Supreme Court has spoken in the interim.

B. *The Board Has Demonstrated No Grounds To Depart From Established Supreme Court Precedent.*

The Board is entitled to adapt labor policy to address the "changing patterns of industrial life." *See NLRB* v. *J. Weingarten, Inc.*, 420 U.S. 251, 266 (1975). The Board has announced no such influence behind its *Jean Country* rationale. Indeed, what has changed since 1956 to warrant revival of a discredited accommodation of rights? If anything, at present there is a more effective set of communication alternatives for union agents than there were in 1956. *See e.g., Babcock and Wilcox Co.*, 109 N.L.R.B. at 491 (noting that in 1954 only 60% of the workforce at Babcock & Wilcox even had a telephone). Judge Torruella observed in his dissent that in 1990, politicians and advertisers regularly communicate and successfully persuade people by using methods that the Board has now deemed ineffective for merely "reaching" people. *See Lechmere, Inc.*, 914 F.2d at 328 (Torruella, J., dissenting), Pet. A-28. Moreover, there evidently were no "changing patterns of industrial life" influencing the Supreme Court's 1978 *dicta* that authorized trespass is "*rare and . . . is far more likely to be unprotected than protected*", and an employer's right to bar non-employee union organizers from his property "*remains the general rule.*" *Sears*, 436 U.S. at 205 (emphasis added).

C. *The Board's Historically Inconsistent Applications Of* Babcock & Wilcox *Further Reduce The Level Of Deference Required.*

"An agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is 'entitled to considerably less deference' than a consistently held agency view." *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 446 n.30

(1987). The *Jean Country* analysis, including *Lechmere, Inc.*, caps a long history of inexplicable inconsistency in the Board's treatment of *Babcock & Wilcox*, as shown by a sampling of case law over the past few decades.

In 1962 the Board (reversing the Trial Examiner) upheld an employer's right to bar union organizers from a private road that bisected a large factory and linked two public streets, even though "for the convenience of the public the [employer had permitted] limited use of the street as a passageway for pedestrians and motor vehicles," and the Trial Examiner concluded that it was a "public thoroughfare." *General Dynamics/Telecommunications, div. of General Dynamics Corp.*, 137 N.L.R.B. 1725, 1726-27, 50 L.R.R.M. (BNA) 1475, 1476 (1962). Citing *Babcock & Wilcox*, the Board found that the union organizers could adequately reach the 3,000 member target workforce by handbilling cars at three of the five gates into the plant (even though less than half the workforce used these means of access), by handbilling the 300 employees who walked to work, and by conducting small meetings at employees' homes and sending literature to small groups of employees. *Id.* at 1727-28, 50 L.R.R.M. (BNA) at 1476. It is notable that the union's organizing effort spanned four years, including handbilling on public property for six months before the union finally attempted to use the private roadway. *Id.* at 1726, 1728, and 1740, 50 L.R.R.M. (BNA) at 1477. The Board found no importance in the fact that ninety percent of the workforce lived in metropolitan Rochester, New York, a city of 350,000. *Id.* at 1726, 50 L.R.R.M. (BNA) at 1475. The Board also showed only slight concern that there was "some difficulty" posed to the organizers by heavy traffic entering the plant. *Id.* at 1728, 50 L.R.R.M. (BNA) at 1476. The union was implicitly faulted for "not avail[ing] itself of other channels of communication such as newspapers, radio, or television." *Id.*, 50 L.R.R.M. (BNA) at 1477.

Just six years later the Board announced a "big city rule" in

Solo Cup Co., 172 N.L.R.B. 1110, 68 L.R.R.M. (BNA) 1385 (1968), *enforcement denied*, 422 F.2d 1149 (7th Cir. 1970). The Board protected the trespass of union organizers who handbilled on a privately owned street leading into an industrial park. The Board found that it was "virtually impossible" to meet employees away from the premises, because the plant and workforce were situated in metropolitan Chicago. *Id.* at 1110-11, 68 L.R.R.M. (BNA) at 1386. Similarly, it was ruled "virtually impossible to stand safely at [the nearest public street] intersection and successfully pass out literature of any kind because cars approaching the intersection turn both right and left." *Id.* at 1110, 68 L.R.R.M. (BNA) at 1386.[12] Newspapers, radio and television were ruled out because the union "would have a problem in any event deciding on the appropriate stations or newspapers and would not be able to reach employees *effectively* with its message through such media." *Id.* at 1111, 68 L.R.R.M. (BNA) at 1386 (emphasis in original). The private roadway itself was deemed "a quasi-public area" because members of the public were not barred, and the police, mail service, and other services all had access. *Id.*, 68 L.R.R.M. (BNA) at 1386.

A few years later the Board issued three decisions the same day, adding to the confusion surrounding *Babcock & Wilcox* access cases. In *Monogram Models, Inc.*, 192 N.L.R.B. 705, 77 L.R.R.M. (BNA) 1913 (1971), the Board (reversing the Trial Examiner) endorsed property rights over Section 7 rights, denying union organizers access to a plant parking lot. As in *General Dynamics, supra*, the Board was unconvinced that the admitted "difficulty" of handbilling in the press of traffic turning into the plant from a forty mile per hour roadway, and the plant's location in Chicago, were enough to warrant protected trespassing under *Babcock & Wilcox*. *Id.* at

[12] Note the similarity of these comments to the Board's 1954 conclusion that it was "impossible or unreasonably difficult" for the union to reach the Babcock & Wilcox workforce. *Babcock and Wilcox Co.*, 109 N.L.R.B. at 493-94, 34 L.R.R.M. (BNA) at 1374.

705-06, 77 L.R.R.M. (BNA) at 1914. The Trial Examiner had ruled that the case was "governed by *Solo Cup*." *Id.* at 712. The Board majority did not mention *Solo Cup*, but modified it in principle by refusing to adopt a "big city rule." *Id.* at 706, 77 L.R.R.M. (BNA) 1914.

In the second of the three cases, *Falk Corp.*, 192 N.L.R.B. 716, 77 L.R.R.M. (BNA) 1916 (1971), the Board upheld the Trial Examiner's ruling that union organizers could not trespass on a private viaduct leading into a large plant. The alternative means of communication available to the union included: handbilling employees (almost twenty-five percent of the workforce) who used pedestrian entrances and gathered at bus stops; a license plate check of cars entering and leaving the plant,[13] which led to mail and home contact; the erection of large banners near the plant; a single meeting that was announced in the banners and handbills; and newspaper, radio, and television advertising. *Id.* at 719-21, 77 L.R.R.M. (BNA) at 1919-21. According to the Board, the obvious deficiencies of license plate tracing were not critical — the union should not care that some supervisors or office workers received mail aimed at production workers; carpoolers usually alternate driving duties, so diligent license plate checks for many days could yield the identities of all members of a pool; carpoolers are likely to talk about any union message received only by the driver; and even if the list obtained by license plate tracing is overbroad or inaccurate, it can give the union a

[13] In *Falk Corp.*, a union organizer testified that with an "informal check" of license plates in his "spare moments" on eight to ten occasions within a month, sometimes even using his rear view mirror, he obtained a list of 593 names, only half of which turned out to be employees. *Falk Corp.*, 192 N.L.R.B. at 717-18. The Board adopted the Trial Examiner's finding that "with a little more effort" the union could have compiled "a much more comprehensive list of names and addresses of Falk employees who drive to work." *Id.* at 720, 77 L.R.R.M. (BNA) at 1919. Compare this to the Board's implicit endorsement of the Union's minimal license plate tracing efforts at Lechmere as "diligent." *Lechmere, Inc.*, 295 N.L.R.B. No. 15, slip op. at 5, 131 L.R.R.M. (BNA) at 1482, Pet. B-5.

foothold to obtain better information from interested employees who were accurately identified. *Id.* at 720, 77 L.R.R.M. (BNA) at 1919. The cost and effectiveness of advertisements in the news media did not factor their use completely out of the question. *Id.* at 721, 77 L.R.R.M. (BNA) at 1920-21.

The third case simultaneously issued was *Scholle Chemical Corp.*, 192 N.L.R.B. 724, 78 L.R.R.M. (BNA) 1009 (1971), *enforced* 82 L.R.R.M. (BNA) 2410 (7th Cir. 1972), in which a divided Board affirmed a Trial Examiner's finding that union organizers could trespass even though they were able to mail literature directly to 220 out of 350 employees. Despite this evidence, the Board held that reasonable alternative means of communication were not available because the plant and the employees' homes were located in Chicago, the employees entered and left work in a larger stream of workers from another nearby plant, and there was some physical risk and traffic disruption that could result from handbilling at the nearest public property. *Id.* at 729-30, 78 L.R.R.M. (BNA) at 1011. Like the Trial Examiner in *Monogram Models*, who was reversed, the Trial Examiner in *Scholle Chemical Corp.* had expressly relied upon *Solo Cup* to find that trespass was authorized. *Id.* at 730, 78 L.R.R.M. (BNA) at 1012. Thus, on the same day, the Board both rejected and endorsed the "big city" factor in the alternative means analysis.

In *Dexter Thread Mills d/b/a Lee Wards*, 199 N.L.R.B. 543, 81 L.R.R.M. (BNA) 1293 (1972), the Board reviewed facts indistinguishable in all major respects from *Lechmere, Inc.* and without difficulty came to the opposite conclusion. The organizing target was a retail store workforce; the site was in Elgin, Illinois, a "large metropolitan area" on the outskirts of Chicago; the property contained the store and a few other buildings, but was dominated by a large, open parking area; there were three driveways into the parking lot from a four lane, forty mile per hour highway; a ten foot wide grassy strip

of public property ran along the road; the target workforce numbered 350 to 450, working various shifts; sixty percent lived in Elgin; all came to work by private auto; store hours began at 9:00 a.m. and most of the employees came to work before that; and the union's organizing efforts included trips into the store; handbilling in the parking lot (all of which eventually was prevented by management); handbilling from public property; tracing license plate numbers; and mail and home visits, which were not very fruitful. *Id.* at 543-44, 81 L.R.R.M. (BNA) at 1293-94. The Board upheld the employer's property rights largely because it could "be assumed that the only automobiles going into Respondent's parking lot prior to 9:00 a.m. would belong to employees"; "it would have been relatively easy and safe for the union organizers to stand on the public easement . . . and copy the license numbers of cars"; and "[f]rom this, and through greater utilization of sympathetic employees, the Union could have obtained a fairly complete list of employees for direct home contact or for distribution of literature through the mails." *Id.* at 545, 81 L.R.R.M. (BNA) at 1295.

In the late 1970's and early 1980's the Board issued opinions that clearly foreshadowed the present state of affairs. In *Montgomery Ward & Co., Inc.*, 265 N.L.R.B. 60, 111 L.R.R.M. (BNA) 1345 (1982) and *Giant Food Markets, Inc.*, 241 N.L.R.B. 727, 100 L.R.R.M. (BNA) 1598 (1979), the Board addressed the issue of consumer or "area standards" picketing and handbilling, in which a union is appealing to the general public not to patronize an employer with whom the union has some dispute. In these cases the Board began to give heavy weight to the "openness to the public" of retail store premises as a factor supposedly reducing the "strength" of property rights. *Montgomery Ward*, 265 N.L.R.B. at 69; *Giant Food Markets*, 241 N.L.R.B. at 729, 100 L.R.R.M. (BNA) at 1600. In conjunction therewith, the Board found that unions engaged in consumer or area standards appeals could not reasonably reach their intended audience (the public who came to shop at the target store) except by stationing their representatives immediately at the store entrance. *Montgomery Ward*, 265 N.L.R.B. at 68-69; *Giant Food Markets*, 241 N.L.R.B. at 728-29, 100 L.R.R.M. (BNA) at 1600. Purportedly relying on *Babcock & Wilcox*, the Board resolved this conflict in favor of Section 7 rights, despite expressing concern that it was protecting an exercise of rights "not for the benefit of the Employer's employees, but rather for the benefit and protection of complete strangers to this employment relationship," and therefore that a good argument could be made that "such picketing should not be allowed on the Employer's premises." *Giant Food Markets*, 241 N.L.R.B. at 728, 100 L.R.R.M. (BNA) at 1599.

In 1986 the Board attempted to remove "reasonable alternative means" from the primary *Babcock & Wilcox* inquiry, reducing this crucial issue to a tie-breaker when the Board deemed that apples equaled oranges; *i.e.*, that property rights were as "strong" as Section 7 rights. *Fairmont Hotel*, 282 N.L.R.B. 139, 123 L.R.R.M. (BNA) 1257 (1986). Fueling this action was the Board's conclusion, based upon *Giant Food Markets*, that use of the reasonable alternative means test meant that "a union engaging in area-standards activity would inevitably find it easier to establish its right to access than a union engaged in organizing activity." *Fairmont Hotel*, 282 N.L.R.B. at 141, 123 L.R.R.M. (BNA) at 1259. The short-lived *Fairmont Hotel* analysis then ended in 1988 with *Jean Country*, but not before the Board issued a stream of *Fairmont Hotel* cases marked by concurrences in the outcomes, and extensive dissonance in the rationale.[14]

[14] *See, e.g. Homart Development Co.*, 286 N.L.R.B. 714, 126 L.R.R.M. (BNA) 1244 (1987); *Emery Realty, Inc.*, 286 N.L.R.B. 372, 126 L.R.R.M. (BNA) 1241 (1987), *enforced*, 863 F.2d 1259 (6th Cir. 1988); *L&L Shop Rite, Inc.*, 285 N.L.R.B. 1036, 126 L.R.R.M. (BNA) 1151 (1987); *Sisters International, Inc.*, 285 N.L.R.B. 796, 126 L.R.R.M. (BNA) 1148 (1987); *Skaggs Companies, Inc.*, 285 N.L.R.B. 360, 126 L.R.R.M. (BNA) 1149 (1987); *Providence Hospital*, 285 N.L.R.B. 320, 126 L.R.R.M. 1145 (BNA)

This is a glimpse of the confusing thicket into which litigants have traveled since *Babcock & Wilcox*. This succession of cases is inconsistent and irreconcilable. Moreover, the Board now seems to have reached a point of routinely granting trespassory access largely in order to "cure" a logical inconsistency that is entirely of its own making — the notion that "weak" Section 7 rights such as area standards activity deserve protection to the point of trespassing, because alternative means of reaching the intended audience are more difficult to find than those available in an organizing context. *See Giant Food Markets*, 241 N.L.R.B. at 728, 100 L.R.R.M. (BNA) at 1599-1600.[15]

Finally, even the Board's post-*Jean Country* cases have displayed some puzzling and pivotal inconsistencies. In *Red Food Stores, Inc.*, 296 N.L.R.B. No. 62, 132 L.R.R.M. (BNA) 1164 (1989), the union's choice to use a mass media campaign was factored into the reasonable alternative means equation and trespassory access was denied. In *Lechmere, Inc.*, the Union's choice to use full-page newspaper advertisements was

(1987); *Smitty's Super Markets, Inc.*, 284 N.L.R.B. 1188, 125 L.R.R.M. (BNA) 1268 (1987); *Greyhound Lines, Inc.*, 284 N.L.R.B. 1138, 125 L.R.R.M. (BNA) 1266 (1987); *Schwab Foods, Inc.*, 284 N.L.R.B. 1055, 125 L.R.R.M. (BNA) 1225 (1987); *Browning's Foodland, Inc.*, 284 N.L.R.B. 939, 125 L.R.R.M. (BNA) 1264 (1987); *United Supermarkets, Inc.*, 283 N.L.R.B. 814, 125 L.R.R.M. (BNA) 1069 (1987).

[15] Although this issue is not directly presented on these facts, it is not a conundrum, as the Board apparently perceives it to be. The Court has recognized that area standards picketing is not likely to be "entitled to the same deference in the *Babcock* accommodation analysis as organizational solicitation." *Sears*, 436 U.S. at 206 & n.42. It is thus legitimate to impose an even heavier burden upon a union seeking to compromise recognized property rights when it does not involve the exercise of a "core" Section 7 right. That greater burden can be framed by imposing an even more challenging set of "reasonable" alternatives upon unions exercising other than core Section 7 rights — alternatives such as more frequent or sustained use of mass media, mass leafletting on public property, or mass mailings to the public — the "usual channels" for appealing to the public at large.

practically disregarded. In *Tecumseh Foodland*, 294 N.L.R.B. No. 37, 131 L.R.R.M. (BNA) 1365 (1989), the Board found that property rights prevailed over Section 7 rights merely because five union agents peacefully congregated in a small area near the entrance to the store, making customer access somewhat more difficult. Lechmere was prepared to prove much more serious misconduct, and the evidence was excluded. J.A. 30-34, 54, 55-56, 79-81, 84-85.

This history of inconsistency is deserving of no great deference. The *Jean Country* accommodation itself and as applied is an attempt to circumvent if not reverse *Babcock & Wilcox*. The Court should not defer to this unfounded abrogation of recognized property rights.

IV. The Court Should Reaffirm *Babcock & Wilcox* Principles And Correct The Deficiencies In The *Jean Country* Analysis That So Readily Cause Abrogation Of Property Rights.

The *Sears dicta* accurately depicted the *Babcock & Wilcox* holding. Instances of trespass protected by Section 7 should be rare, and trespass should be far more likely to be unprotected than protected. *Sears*, 436 U.S. at 205. The right to bar non-employee union organizers from private property must remain the general rule, and the burden of justifying an intrusion into recognized property rights should be suitably heavy. *Id.* No intrusion into private property should even be considered without a strong showing that the intended audience is inaccessible to normal means of contact.

A union seeking protection for trespassing therefore must produce more than a lack of employee response and guesswork about whether employees have heard the message, to show that non-trespassory means of communication are unavailable. To justify trespass the union must show that its available communication methods are futile, not just flawed;

and that the workforce is beyond reach, not just unresponsive. Because the proper test involves the *availability* of alternative methods of contact, it will be a highly unusual factual setting in which a union can show the need to trespass without having tried other means to contact employees. A union seeking to trespass on the theory that employees are *per se* out of reach bears the heaviest of burdens.

The *Babcock & Wilcox* Court instructed the Board to accommodate property rights and Section 7 rights with as little destruction of one as is consistent with maintenance of the other. 351 U.S. at 112. The *Jean Country* analysis inherently presumes that organizing rights are likely to be destroyed unless, in a great many circumstances, the union can meet employees at the workplace door. This conclusion plainly provokes almost casual disregard of property rights, particularly those of employers whose premises are open to the public.

Among its many faults, the *Jean Country* analysis thus contains an almost patronizing view of the employees who are at the center of this controversy. *Babcock & Wilcox* protected the right of *employees* to become aware of the existence and potential benefits of unionization. Mature individuals, having been reached by an appeal to organize and form a union, can decide for themselves whether to pursue the matter.[16] *Jean Country*, at the expense of property rights, expansively protects the ability of unions to get closer to a workforce that may simply be unreceptive to the union's appeal. The difference between employees' rights and union organizers' rights is "one of substance." *Babcock & Wilcox*, 351 U.S. at 113. *Jean Country* fails to make this distinction.

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[16] *See, e.g., Shopping Kart Food Market, Inc.*, 228 N.L.R.B. 1311, 1313, 94 L.R.R.M. (BNA) 1705, 1708 (1977) ("[W]e believe that Board rules in this area must be based upon a view of employees as mature individuals who are capable of recognizing campaign propaganda for what it is and discounting it.")

CONCLUSION

The judgment and decree of the United States Court of Appeals should be reversed and enforcement of the order of the National Labor Relations Board denied.

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